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ALLIANCE BANK MALAYSIA BHD

v.

WAN SHALIHUDIN WAN IBRAHIM & ANOTHER CASE

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUITS NO: D3-22-240-2007 & D3-22-1589-2008]
20 MARCH 2012

C ***BANKING:*** *Securities for advances - Pledge of shares - Contractual terms - Whether breached - Whether bank acted mala fide in selling off pledged shares - Whether bank acted surreptitiously - Whether sale of shares breached collateral contract between parties - Whether there was any evidence that collateral contract existed*

D ***CIVIL PROCEDURE:*** *Pleadings - Counterclaim - Whether counterclaim for host of declarations abused process of court - Whether such counterclaim contravened spirit and intent of declaratory reliefs under s. 41 of Specific Relief Act 1950 - Whether declaratory relief discretionary and could be used as alternative remedy for contractual breach*

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Alliance Bank Malaysia Berhad ('the bank') had granted an investor, W Shalihudin bin W Ibrahim ('the defendant') an overdraft facility ('the OD facility') to finance his purchase of private placement shares in a main-board listed company ('GBH'). F The facility was secured by the defendant's pledge of his shares in GBH to the bank. In addition, Ceramtec Sdn Bhd ('Ceramtec'), which held a controlling stake in GBH, also pledged a substantial amount of its shares in that company to the bank. Between the years 2001 and 2003, the OD facility went into arrears several G times and throughout the whole of 2004 and 2005, the facility was under continuous default, yet the bank did not terminate the facility or touch Ceramtec's pledged shares. It was Ceramtec's and the defendant's case that sometime in 2003, top-level representatives of the bank and Ceramtec and the defendant H himself agreed, *inter alia,* that if the bank decided to force-sell Ceramtec's pledged shares, Ceramtec would be given notification and the opportunity to redeem the shares in view of the controlling stake it had in GBH ('the collateral contract'). In July/ August of 2005, the bank issued letters of demand to both the I defendant and to Ceramtec to settle the outstanding sums under the OD facility within a week and then did not take any action until 13 months later when, without notice, it sold off the entire block of shares pledged in respect of the OD facility. In its suit

against the bank, Ceramtec claimed the bank acted in breach of the express representations it made under the collateral contract and behaved in an unconscionable and surreptitious manner in selling the shares below market value causing Ceramtec not only to lose the value of the shares but also its controlling stake in GBH. Ceramtec submitted the bank was duty-bound to have given a fresh notice before taking action because the demand upon which it presumably acted had become stale. *Inter alia,* Ceramtec claimed for damages for the loss of the shares. Further and/or alternatively, it claimed for damages for conversion, misrepresentation and breach of contract and for restitution of the shares. In its defence, the bank, *inter alia,* said the terms of the memorandum of deposit of Ceramtec's shares expressly provided that Ceramtec had no right of redemption or equity over the shares and that the bank did not have to notify nor get Ceramtec's consent before it sold the shares. Meanwhile, in its suit against the defendant for the amount owing under the OD facility, the defendant counterclaimed for several declarations including one that the shares were sold in breach of the collateral contract.

Held (allowing bank's claim with costs; dismissing Ceramtec's and defendant's counterclaim with costs):

(1) Ceramtec's version relating to the existence of a collateral contract, *inter alia,* lacked jurisprudence and credibility as the alleged collateral contract was not documented in any manner or supported by any contemporaneous documents. The issue was raised for the first time in the pleadings. There was no evidence of a collateral contract which could be sustained in law. (paras 6, 18 & 24)

(2) There was evidentially no basis to say the sale of the shares was done in bad faith to give any credence to the words 'surreptitious sale'. The complaint of 'surreptitious sale' had no merit as the contractual terms provided for such sale. Considering the volatile nature of share prices, it was not unreasonable for the bank to sell the shares in a surreptitious manner if the terms of the contract provided for it as in the instant case. The bank had not breached any of its obligations in the sale of the shares or conducted itself unfairly in breach of the contractual terms. There was no surreptitious conduct as complained of by Ceramtec and the defendant. (paras 18 & 24)

(3) The defendant's raising of a counterclaim in the form of several declarations was inconsistent with the spirit and intent of declaratory reliefs as advocated in s. 41 of the Specific Relief Act 1950 and case laws and was an abuse of process of court. Declaratory relief was discretionary and not an alternative remedy for contractual breach. There was no obligation for the Court to even consider the declaratory prayers which were prolix in nature and inconsistent with the norms and jurisprudence relating to declaratory relief. (paras 20 & 4)

(4) If there was a breach of any of the contractual terms, the defendant's remedy lay within the Contracts Act 1950. The counterclaim had no substance and the defendant had no defence. In consequence, the declaratory prayers, which were discretionary reliefs, ought to be dismissed *in limine*. (paras 20 & 24)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 ***(refd)***

Armagas Ltd v. Mundogas SA (The "Ocean Frost") [1985] 1 CA 1 ***(refd)***

Bank Bumiputra Malaysia Bhd v. M/s Malek & Joseph Au [1995] 1 LNS 27 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Charles Rickards Ltd v. Oppenhaim [1950] 1 KB 616 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 ***(refd)***

China and South Sea Bank Ltd v. Tan [1989] 3 All ER 839 ***(refd)***

Chong Kow v. Kesavan Govindasamy [2009] 8 MLJ 41 HC ***(refd)***

Combe v. Combe [1951] 2 KB 215 ***(refd)***

Cooperative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC ***(refd)***

Cryne v. Barclays Bank Plc [1987] BCLC 548 ***(refd)***

Cuckmere Brick Co Ltd & Another v. Mutual Finance Ltd [1971] 1 Ch 949 ***(refd)***

Dato' Abd Rahim Mohamad v. Abdul Farish Rashid [2009] 1 CLJ 395 CA ***(refd)***

Deokali Koer v. Kedar Nath (1912) 39 Cal 704 ***(refd)***

Deverges v. Sandeman, Clark & Co [1902] 1 Ch 579 ***(refd)***

Dick Bentley Productions Ltd & Anor v. Harold Smith (Motors) Ltd [1965] 2 All ER 65 ***(refd)***
Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor & Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***
Gan Eng San & Anor v. Alliance Investment Bank & 3 Ors [2009] 1 LNS 1231 HC ***(refd)***
Gek Lau Choon Theatrical Company v. Hu Kiang Yan [1936] 1 LNS 16 HC ***(refd)***
Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd [1986] 1 LNS 60 PC ***(refd)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***
Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***
Hartley v. Hymans [1920] 3 KB 475 ***(refd)***
Heilbut Symons & Co v. Buckleton [1913] AC 30 ***(refd)***
Hiap Huat Pottery (S) Pte Ltd v. TV Media Pte Ltd [1999] 1 SLR 14 ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***
Hoyt's Pty Ltd v. Spencer [1919] 27 CLR 133 ***(refd)***
Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 1 LNS 96 HC ***(refd)***
J Evans & Son (Portsmouth) Ltd v. Andrea Merzario Ltd [1976] 1 WLR 1078 ***(refd)***
Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 CA ***(refd)***
Kong Ming Bank Bhd v. Leong Ho Yuen [1982] 1 LNS 23 FC ***(refd)***
Latham v. Credit Suisse First Boston [2000] 2 SLR 693 ***(refd)***
Lin Wen-Chih & Anor v. Mycom Berhad [2010] 1 LNS 1145 HC ***(refd)***
Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***
Miller v. Cook [1870] LR 10 Eq 641 ***(refd)***
Pengkalen Securities Sdn Bhd v. Kemas Ria Sdn Bhd & Anor [2009] 1 LNS 909 HC ***(refd)***
Pengurusan Danaharta Nasional Bhd v. Miri Salamjaya Sdn Bhd & Ors [2004] 7 CLJ 189 HC ***(refd)***
Public Bank Berhad v. Rahmat Harun [2010] 1 LNS 1533 HC ***(refd)***
RHB Bank Bhd v. Samaworld Asia Sdn Bhd & Anor [2007] 1 LNS 287 HC ***(refd)***
Sabu Development Sdn Bhd v. Kelik Bayel [2007] 9 CLJ 475 HC ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Samaworld Asia Sdn Bhd & Anor v. RHB Bank Bhd [2008] 6 CLJ 44 CA ***(refd)***

Sanyan Lumber Sdn Bhd v. Sanyan Wood Industires Sdn Bhd [2008] 1 LNS 329 HC ***(refd)***

Satriadesa Corporation Sdn Bhd v. Kerajaan Malaysia & Anor [2010] 1 LNS 1407 HC ***(refd)***

Scottish Hydro-Electric plc v. Ismestieff and another [1999] All ER (D) 1453 ***(refd)***

Seow Mui Kim v. Perwira Habib Bank & Ors [1985] 1 LNS 15 HC ***(refd)***

Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA ***(refd)***

Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading [1971] 1 LNS 132 HC ***(refd)***

Silven Properties Ltd and another v. Royal Bank of Scotland plc and others [2004] 4 All ER 484 ***(refd)***

Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***

Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1979] 1 LNS 113 FC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Udayakumar Suppiah v. Ganga Tharan Shanmugam [2010] 1 LNS 1070 HC ***(refd)***

Waja Manufacutring (M) Sdn Bhd & 4 Ors v Alliance Bank Malaysia Berhad (Unreported) ***(refd)***

Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 LNS 201 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Specific Relief Act 1950, s. 41

Other source(s) referred to:

JL Kapur, *Pollock & Mulla, Indian Contract and Specific Relief Acts*, 10th edn, 1986, p 1063

(Suit No: D3-22-240-2007)

For the plaintiff - Cecil Abraham (Rishwant Singh & Gandhi Mohan Maniam with him); M/s Zul Rafique & Partners

For the defendant - Loh Siew Cheang (Choo Jun Lin with him); M/s Cheang & Ariff

(Suit No: D3-22-1589-2008)

For the plaintiff - Christopher Leong (T S Lim & Liz Yap with him); M/s Chooi & Company

For the defendant - Cecil Abraham (Rishwant Singh & Gandhi Mohan Maniam with him); M/s Zul Rafique & Partners

Reported by Ashok Kumar

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the borrower (Shalihudin (defendant)) and third party (Ceramtec), mortgagor of shares, in essence, claiming against the bank (Alliance Bank) for loss and damage for sale of shares in breach of alleged collateral contract and/or surreptitious sale of the mortgaged shares, and the claim of Alliance Bank against the defendant for the balance sum due and owing under the facility terms.

[2] The parties have agreed that the issue of liability to be decided first and the issue of quantum for loss and damage (if any) can be referred to the Deputy Registrar for assessment of damages.

[3] This judgment involves two suits, which have been consolidated. The details are as follows:

(a) In Suit No. D3-22-1589-2008, Ceramtec is the plaintiff, and claims against Alliance Bank for loss and damage arising from the sale of shares. The prayers read as follows:

And the Plaintiff claims:

(i) Damages for loss of the benefit of the 11,420,286 shares pledged by the Plaintiff to the Defendant;

(ii) Further, or in the alternative to (i) above, damages for conversion;

(iii) Further, or in the alternative to (i) and/or (ii) above, damages for misrepresentation;

(iv) Further, or in the alternative to (i), (ii) and/or (iii) above, damages for breach of contract;

(v) Further, or in the alternative to (i) to (iv) above, an order that the Defendant:

(A) do restore the 11,420,286 shares pledged by the Plaintiff to the Defendant, by way of purchase from the open market or otherwise; and

(B) do to transfer such shares to the Plaintiff within 21 days of an order made herein;

A (vi) Interest at the rate of 8% per annum from the date of judgment to the date of full payment upon all sum found to be due to the Plaintiff;

(vii) Costs; and

B (viii) Such further or other relief as this Honourable Court deems fit.

(b) In Suit No. D2-22-240-2007, Alliance Bank is the plaintiff, and claims against the defendant for the indebted sum. The defendant has raised a counterclaim seeking several C declarations, including a declaration that the shares were sold in breach of the alleged collateral contract with Ceramtec. The prayers in the said counterclaim read as follows:

WHEREFORE the Defendant claims:

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(a) Declaration that in all the circumstances that the Plaintiff acted wrongfully or in bad faith or both and without prejudice to the generality of the foregoing, without the prior approval of the Securities Commission, or without prior notice to the Defendant, or by acting on the stale demand dated E 18.7.2005, or contrary to the representations made on 15.5.2006 that the Defendant would have time until 31.12.2006 to liquidate his account, or for a combination of one or more reasons aforesaid in forced selling the Private Placement Shares at approximately RM0.60 in the month of F September 2006;

(b) Declaration that in all the circumstances, the Plaintiff acted wrongfully and in bad faith when it demanded repayment from Ceramtec for a sum of RM9,341,861.55 on 15.8.2005 when Ceramtec was not a debtor but a third parties G securities provider under the Ceramtec's Pledges subject to the collateral contract;

(c) Declaration that the letter of demand dated 15.8.2005 to Ceramtec was an unlawful demand, it being that Ceramtec was under no obligation whether in law or in equity to H honour the demand as if it were the debtor and not a third party securities provider;

(d) Declaration that there was a collateral contract between the Plaintiff, the Defendant and Ceramtec that in the event the Plaintiff was compelled to forcibly liquidate the account of the I Defendant, Ceramtec would be given prior reasonable notification that all shares pledged by Ceramtec were redeemable or were to be redeemed by Ceramtec at the then prevailing market price;

(e) Declaration that the letter of demand dated 15.8.2005, *albeit* wrongly given, having specified a period of 7 days for Ceramtec to pay RM9,341,861.55, the Plaintiff ought to have acted promptly on the demand by either force selling the shares pledged by Ceramtec on 22.8.2005 or at any reasonable time thereafter but not in any event in the month of September 2006 when the price of GBH shares had fallen to approximately RM0.60 per share;

(f) An Order that the Plaintiff acted in breach of the bargain that was struck on 15.5.2006 between the parties in circumstances when the Plaintiff secretively force sold the Private Placement Shares and the shares under the Ceramtec's Pledges (subject to collateral contract) in the month of September 2006;

(g) Declaration that the Plaintiff's Certificate of Indebtedness dated 5.10.2006 is not binding on the Defendant;

(h) An Order for the restitution of the Private Placement Shares and shares under the Ceramtec's Pledges constituting a controlling block in GBR;

(i) As an alternative to prayer (h) above, the Plaintiff is to pay damages to the Defendant in an amount to be determined by this Honourable Court in mitigation of the Defendant's indemnity to Ceramtec;

(j) Damages to be assessed by this Honourable Court for breach of the matters averred to in this Defence and Counterclaim;

(k) Costs;

(l) Such further and other reliefs as this Honourable Court shall deem fit.

[4] It must be noted that the above declarations are framed in a wide manner, and inconsistent with the spirit and intent of declaratory reliefs, as advocated in s. 41 of the Specific Relief Act 1950, and case laws. It is trite that declaratory relief is discretionary relief, and is not an alternative remedy for contractual breach. There is no obligation for the court to even consider the declaratory prayers, which are prolix in nature, and inconsistent with the norms and jurisprudence relating to declaratory relief.

[5] I have captured the jurisprudence relating to declaratory prayers to some extent in *Sabu Development Sdn Bhd v. Kelik Bayel* [2007] 9 CLJ 475. I do not wish to repeat the same, save to say that in *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812, Gopal Sri Ram JCA asserted as follows:

> It is beyond dispute that the remedy of declaration is discretionary in nature. Section 41 of the Specific Relief Act 1950 reads as follows:
>
> > Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and **the court may in its discretion** make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
> >
> > Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
> >
> > Explanation - A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee. (emphasis added.)
>
> Although s. 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v. Zauyah Wan Chik* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v. Radcliffe Urban District Council* [1922] 2 Ch. 490, at p. 507 per Lord Sterndale M.R.) yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v. Government of Sarawak* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v. Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn. Bhd. v. Lye Thai Sang* [1985] 2 CLJ 423; [1985] 2 MLJ 380) or other inequitable conduct (*City of London v. Horner* [1914] 111 LT 512) or where a "cloaked declaration", that is to say, a declaration for a collateral purpose (*Trawnik v. Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v. Griffiths* [1924] 1 KB 941 at p. 960). We wish to make it plain that this list is by no means

exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

[6] It is pertinent to note that:

(i) The central allegation is the existence of a collateral contract in a continuing facility, and the said collateral contract is not alleged to have been made at the time the letter of offer and/or the facility was first granted, ie, in the year 1999 or year 2000, respectively, but in the year 2003. The allegation of the said collateral agreement is not supported by any contemporaneous documents, and the issue was raised for the first time in the pleadings. The parties who are alleging the existence of collateral contract are not lay persons, and in fact, are prominent corporate personalities; and

(ii) The issue relating to surreptitious sale, though will appear to be within the contractual rights of Alliance Bank, need to be considered in the right perspective based on case laws, and the factual matrix of the instant case.

[7] It must also be noted that collateral contract has specific meaning. It is one related to, but ancillary to the main contract. In *Hoyt's Pty Ltd v. Spencer* [1919] 27 CLR 133, it was said that a collateral contract may be either antecedent or contemporaneous to the main contract. In essence, it is meant to exist side by side with the main contract. Any contract after the main contract will not fall within the popular definition of collateral contract as advocated in a number of leading cases on this subject. To name a few are as follows: (i) *Tan Swee Hoe Co Ltd v. Ali Hussain Bros* [1979] 1 LNS 113; [1980] 2 MLJ 16; (ii) *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788; and (iii) *Heilbut Symons & Co v. Buckleton* [1913] AC 30.

[8] Once the main contract is entered into, and come into existence, any other terms or variations are not labelled as collateral contract but supplemental agreement, variation, addition and deletion etc. Usually, the main contract itself will make provisions on how such variations ought to be made and it will specifically state that it has to be in writing. In this time and era any allegation of oral agreement that too by corporate personalities

relating to corporate transaction, must be frowned by courts. In *Sanyan Lumber Sdn Bhd v. Sanyan Wood Industires Sdn Bhd* [2008] 1 LNS 329; [2008] 8 MLJ 336, I have made the following observations:

> The plaintiffs rely greatly on my judgment in *Tang Sing Wung v. Genesis Force Sdn Bhd* (Sibu Civil Appeal No 12-9 of 2007) where it was stated:
>
> (i) The appellant in the entire submission placed great emphasis on the oral agreement. However, as a matter of fact the learned sessions judge had not totally accepted the appellant's version. In my view, courts should give very little weight to allegation of oral agreement in this time and era and more so when they are dealing with corporate entities (see *Dato Ting Check Sii v. Datuk Haji Mohamad Tufail bin Mahmud & Ors* [2007] 5 MLJ 339; [2007] 7 MLJ 727).
>
> (ii) The early part of the common law jurisprudence on contract developed on the basis that people resorted almost in all cases to oral evidence. As literacy level grew, written agreements became more popular. This resulted in the introduction of evidential rules which did not as a general rule allow written documents to be displaced by oral agreements. Almost all of these rules as to evidence have been encapsulated in our Evidence Act 1950. In this case, the appellant alleges oral agreement subsequent to the written agreement but has not put the terms of the agreement in writing contemporaneously and sent it to the respondent, which is a corporate entity. Further, there is no good reason given as to why the oral agreement of such an important matter was not put in writing. Courts generally will not accept sympathy evoking stories of oral agreement at this time and era, when not only has literacy level increased but also the awareness of legal right, and need for documentation, such as written agreements, delivery order invoices etc. In this case, the appellant has entered into a written agreement, has also issued invoices, but has not reduced the oral aspect into writing. On such facts, court will not ordinarily lend credence to the appellant's version as such precedent will promote unhealthy litigation and it is not in the public interest to do so, taking into consideration that such oral agreements can almost in all circumstances be contemporaneously reduced in writing. On this subject, I will go to the extent of saying that court should invoke adverse presumption against parties who attempt to introduce oral agreement in civil cases where there is ample opportunity contemporaneously to reduce it in writing.

[9] I am mindful of the observation of Lord Denning in *J Evans & Son (Portsmouth) Ltd v. Andrea Merzario Ltd* [1976] 1 WLR 1078 where it was observed: A

> When a person gives a promise or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding. B

[10] However, when it comes to oral evidence, unlike England, we have specific statutes to regulate it. The Evidence Act 1950 does not permit oral evidence to be admitted *per se*. In *Latham v. Credit Suisse First Boston* [2000] 2 SLR 693, Yong Pung How CJ in construing a similar provision found in our Evidence Act 1950, had this to say: C

> In our judgment, it [s 94(b)] could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of a part oral, part written contract. Section 94(b) only allows the admission of evidence of a collateral contract on matters which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: *Ng Lay Choo Marion v. Lok Lai Oi* [1995] 3 SLR 221. D E

[11] If there is a collateral contract in writing, it has high probative value in respect of its terms. If the collateral contract is not evidence in writing, or after the execution of the main contract, it is not subsequently referred to in writing, then in evidential terms, the allegation will lack credibility, and the version alleged will stand as a story incapable of being made admissible under the Evidence Act 1950, if the story is inconsistent with the terms of the main contract. F G

[12] In the instant case the letter dated 17 December 2003 at pp. 598 to 600 cannot be a basis to allege a new contract has come into existence. The allegation that the said letter was issued pursuant to a 'collateral contract', the label used by Ceramtec and defendant in respect of a continuing facility, does not subscribe to the jurisprudence of collateral contract. H

[13] The parties have relied on the following cases: *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; *Udayakumar Suppiah v. Ganga Tharan Shanmugam* [2010] 1 LNS 1070; [2011] 7 MLJ 429; *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another* I

A *Case* [1995] 3 CLJ 639; *Dick Bentley Productions Ltd & Anor v. Harold Smith (Motors) Ltd* [1965] 2 All ER 65; *Dato' Abd Rahim Mohamad v. Abdul Farish Rashid* [2009] 1 CLJ 395; *Combe v. Combe* [1951] 2 KB 215; *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7; [1983]
B 2 MLJ 85; *Satriadesa Corporation Sdn Bhd v. Kerajaan Malaysia & Anor* [2010] 1 LNS 1407; [2010] MLJU 1416; *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155; [1991] 1 MLJ 33; *Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394;
C [1983] 1 MLJ 220; *Miller v. Cook* [1870] LR 10 Eq 641; *Deverges v. Sandeman, Clark & Co* [1902] 1 Ch 579; *Seow Mui Kim v. Perwira Habib Bank & Ors* [1985] 1 LNS 15; [1987] 1 MLJ 46; *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89; *Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading*
D [1971] 1 LNS 132; [1972] 1 MLJ 21; *Charles Rickards Ltd v. Oppenhaim* [1950] 1 KB 616; *Hartley v. Hymans* [1920] 3 KB 475; *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 LNS 201; [1969] 1 MLJ 245; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; *Kong Ming*
E *Bank Bhd v. Leong Ho Yuen* [1982] 1 LNS 23; [1982] 2 MLJ 111; *Cooperative Central Bank Ltd (In Receivership) v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467; [1991] 2 MLJ 283; *Cryne v. Barclays Bank Plc* [1987] BCLC 548; *Gan Eng San & Anor v. Alliance Investment Bank & 3 Ors* [2009]
F 1 LNS 1231; [2010] 7 MLJ 615; *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442; *Cuckmere Brick Co Ltd & Another v. Mutual Finance Ltd* (CA) [1971] 1 Ch 949; *Pengkalen Securities Sdn Bhd v. Kemas Ria Sdn Bhd & Anor* [2009] 1 LNS 909; *Heilbut, Symons & Co v. Buckleton*
G [1913] AC 30; *Gek Lau Choon Theatrical Company v. Hu Kiang Yan* [1936] 1 LNS 16; [1937] Vol VI MLJ 25; *Tan Swee Hoe Co Ltd v. Ali Hussain Bros* [1979] 1 LNS 113; [1980] 2 MLJ 16; *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 1 LNS 96; [1993] 3 MLJ 433; *Bank*
H *Bumiputra Malaysia Bhd v. M/s Malek & Joseph Au* [1995] 1 LNS 27; [1995] 4 MLJ 251; *Hiap Huat Pottery (S) Pte Ltd v. TV Media Pte Ltd* [1999] 1 SLR 14; *Scottish Hydro-Electric plc v. Ismestieff and another* [1999] All ER (D) 1453; *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788; [1999] 2 MLJ 481;
I *Pengurusan Danaharta Nasional Bhd v. Miri Salamjaya Sdn Bhd & Ors* [2004] 7 CLJ 189; [2004] 4 MLJ 327; *RHB Bank Bhd v. Samaworld Asia Sdn Bhd & Anor* [2007] 1 LNS 287; [2007]

3 MLJ 170; *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217; [2008] 5 MLJ 157; *Samaworld Asia Sdn Bhd & Anor v. RHB Bank Bhd* [2008] 6 CLJ 44; *Chong Kow v. Kesavan Govindasamy* [2009] 8 MLJ 41; *Public Bank Berhad v. Rahmat Harun* [2010] 1 LNS 1533; *Lin Wen-Chih & Anor v. Mycom Berhad* [2010] 1 LNS 1145; *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839; *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662; *Silven Properties Ltd and Another v. Royal Bank of Scotland plc and Others* [2004] 4 All ER 484; *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229; *Armagas Ltd v. Mundogas SA (The "Ocean Frost")* [1985] 1 CA 1; *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd* [1986] 1 LNS 60; [1987] 1 MLJ 257; *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor & Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; [1989] 1 MLJ 35; *China Airlines Ltd v. Maltran Air Corp & Another Appeal* [1996] 3 CLJ 163; [1996] 2 AMR 223.

A B C D

Brief Facts

[14] The brief summaries of facts have been well articulated by the parties in encls. 36, 39 and 37. The judicial time in writing the judgment will be much saved by repeating the same.

E

[15] Alliance Bank's summary of case in encl. 36 reads as follows:

F

1. On 21.11.2000, a vesting order vested all assets and liabilities of one International Bank Malaysia Berhad ("IBMB") with the Plaintiff.

2. IBMB had Extended an Overdraft Facility of RM9,273,000.00 to the Defendant (the "Overdraft Facility"). IBMB and the Defendant executed the following documents:

   (i) IBMB's Letter of Offer dated 24.12.1999;

   (ii) Facility Agreement dated 25.2.2000;

   (iii) A revised Letter of Offer dated 17.12.2003; and

   (iv) The Plaintiff's Supplemental Letter dated 13.1.2005.

3. There was security for the Overdraft Facility. The security comprised of the following:

   (i) A Memorandum of Deposit dated 25.2.2000 with the Defendant; and

G H I

A (ii) A Memorandum of Deposit dated 25.2.2000 with Ceramtec Sdn Bhd.

4. The details of the Overdraft Facility are pleaded in paragraph 6 of the Statement of Claim.

B 5. The Defendant breached the Overdraft Facility and did not rectify its breach.

6. A demand was made by the Plaintiff on the Defendant. That demand was not complied with.

C 7. This claim was accordingly filed by the Plaintiff to recover a sum of RM367,739.95, contractual and legal interest and costs.

[16] Ceramtec's summary of case in encl. 37 reads as follows:

D 1. Ceramtec's claim against Alliance Bank Berhad (the "Bank") is based on a surreptitious sale of the controlling stake held by Ceramtec in a main board listed company, namely Goh Ban Huat Berhad ("GBH"). The surreptitious sale, which happened in September 2006, caused Ceramtec to lose
E control of GBH to Tan Sri Dato' Tan Hua Choo. Furthermore, the shares were sold at a price below the then market rate. The claim is based on, *inter alia*, breach of contract; unconscionable transaction; acting against a legitimate expectation; and acting against express representations.

F 2. GBH was started by the Goh family over a 100 years ago and the Goh family had controlled the business since then until September 2006.

3. In 1999, Ceramtec, a private limited company, also in
G control of the Goh family, held 37.8% of GBH's issues and paid-up capital. Other members of the family held approximately another 9%.

4. Evidence of the Goh family's control of GBH and Ceramtec will be adduced at trial.

H 5. In 1999, to meet with regulatory requirements, and to raise working capital, GBH decided to issue a private placement of 5.6 million shares to a Bumiputra investor - W. Shalihudin b. W. Ibrahim ("Wan"). Wan is the Defendant in
I suit no. D2-22-240-2007.

6. In order to finance the said private placement Wan took up a facility from International Bank of Malaysia Berhad ("IBMB"). IBMB subsequently merged with 6 other banking institutions to become Alliance Bank Berhad.

7. Prior to this, GBH and the Goh family had enjoyed a long banker-customer relationship with IBMB and subsequently, Alliance Bank Berhad.

8. The Bank offered Wan an overdraft facility in 1999 (the "OD Facility").

9. The OD facility was secured by a Memorandum of Deposit signed by Wan, through which Wan pledged his private placement shares to the Bank.

10. In addition, the Bank requested for additional security. This was provided by Ceramtec by pledging 4 million of its GBH shares to the Bank. Ceramtec executed a 3rd Party Memorandum of Deposit ("3rd Party MOD") in favour of the Bank.

11. All of these events occurred between 1999-2000 and are undisputed facts.

12. In September 2000, based on verbal request by the Bank, Ceramtec pledged another 1.3 million of its GBH shares as additional security for the OD Facility.

13. Although the tenure of the OD Facility meant that it should have expired on 24.02.2001, parties continued to conduct themselves on the basis that the facility was still operational.

14. In March 2001, based on another verbal request by the Bank, Ceramtec pledged a further 3.2 million of its GBH shares to the Bank.

15. In May 2001, the OD Facility was formally renewed in writing.

16. At this point, Ceramtec had pledged some 8.6 million of its GBH shares to the Bank as security for the facility.

17. Between 2001 to 2003, the OD Facility had gone into arrears several times. The Bank would regularly send reminders to Wan, copied to Ceramtec, but at no time was the OD Facility terminated and nor were Ceramtec's pledged shares ever touched.

18. In December 2003, due to the OD facility being in arrears, the Bank's then CEO, Ng Siek Chuan, contacted Ceramtec's business advisor, Tony Goh, to discuss the matter. After discussion between Tony Goh, Ng, and Wan, it was agreed that:

    a. Ceramtec would continue to pledge its GBH shares as security for the facility.

    b. Ceramtec would pledge more shares if requested to do so by the Bank.

    c. If the Bank were to ever consider force-selling Ceramtec's pledged shares, Ceramtec would always be notified and given the opportunity to redeem their pledged shares.

    It was also emphasized to the Bank that Ceramtec's pledged shares were integral part of the Goh family's controlling stake in GBH.
    (the "Collateral Contract").

19. This Collateral Contract will be proved through evidence given by Ng Siek Chuan, Tony Goh and Wan.

20. The OD Facility was again renewed in writing.

21. Throughout 2004, the OD Facility remained in arrears. Despite many reminder letters to Wan, copied to Ceramtec, the Bank never terminated the facility and never touched Ceramtec's pledged shares. The Bank did however request for another further pledge of shares, and Ceramtec acquiesced by pledging another 2.8 million of its GBH shares. At this point, Ceramtec had pledged a total of 11,420,286 of its GBH shares to the Bank ("Ceramtec's Pledged Shares").

22. Throughout 2005, the facility still remained in arrears and the Bank sent its usual reminders, but again, no action was taken. On 15.08.2005, Ceramtec received a letter demanding for all outstanding sums under the OD Facility to be paid within 7 days. Ceramtec did not act on this letter as it treated Ceramtec as a guarantor, which Ceramtec was not. In any event, no action was taken by the Bank against Ceramtec.

23. In 2006, representatives of GBH wanted to discuss an outstanding facility the Bank had provided to GBH. It was decided that Wan should also discuss the OD Facility with the Bank's new CEO, Bridget Lai.

24. A meeting was fixed on 15.05.2006, where representatives of Ceramtec, GBH and Wan met up with Bridget Lai.

25. At this meeting, it was agreed with Bridget Lai that GBH would be given time until the end of 2006 to pay off its outstanding facilities. In addition, the Bank agreed that the Wan would be given time until the end of 2006 to regularise the OD Facility.

26. Evidence of this meeting will be testified to by Tony Goh, Wan, and Tan Ah Cheun, a representative of GBH.

27. Then, in September 2006, Ceramtec discovered that the Bank had sold off its entire block of pledged shares in a single day in September 2006 (the "Surreptitious Sale").

28. Ceramtec was never given any notice of the Surreptitious Sale.

29. Ceramtec attempted making enquiries with the Bank, both verbal and written, but was met with stony silence on the Bank's part. It was only some 2 months later that the Bank responded, stating that the Surreptitious Sale was based on its letter of demand some 13 months earlier.

30. It was subsequently discovered that Ceramtec's Pledged Shares had been sold to persons linked with the said Tan Sri Tan, who now had control of GBH and continues to do so.

31. Evidence will be adduced showing that:

    a. The Surreptitious Sale was conducted in secret; by way of married deals and direct business transactions; and sold in parcels of below 5% of GBH's paid-up and issued capital so as to avoid the need of reporting to the Kuala Lumpur Stock Exchange.

    b. Bridget Lai subsequently left the Bank after an internal investigation which included the Surreptitious Sale.

    c. That the said Tan Sri Tan ultimately gained control of GBH due to the Surreptitious Sale.

    d. The Bank acted in clandestine and unconscionable manner in carrying out the Secret Sale.

32. The Surreptitious Sale was wrongful for the following reasons:

    a. The Bank breached the Collateral Contract.

A

b. Ceramtec, as a pledgor, was not given any opportunity to redeem its pledged shares.

c. The Bank purported to rely on a demand which was 13 months old.

B

d. Due to the behaviour and conduct of the parties over 7 years, Ceramtec had a legitimate expectation that it should have been notified prior to the Surreptitious Sale; and been given an opportunity to redeem its shares.

C

e. The representations made by the Bank on 15.05.2006 to the effect that no action would be taken until the end of 2006.

D

f. The Bank, in not giving Ceramtec or Wan any notice, and subsequently refusing to confirm the sale; conducting the sale in secret; acting against its representations to Ceramtec and Wan; had acted unconscionably.

E

g. The sale was conducted by dividing Ceramtec's Pledged Shares into parcels constituting less than 5% of the issued and paid-up capital of GBH, which meant that such sales need not have been reported to the Kuala Lumpur Stock Exchange.

h. The shares were sold at a price below the prevailing market rate.

F

i. Ceramtec's Pledged Shares, being a controlling block, should have been sold with a premium attached to it.

j. The Surreptitious Sale was done through married deals or direct business transactions meaning the Bank would have known the identity of the purchasers.

G

33. Due to the Bank's wrongful actions:

a. Ceramtec lost its controlling stake in GBH.

H

b. Ceramtec directly lost RM2.06 per share (RM23,525,789.00 in aggregate) for the block of Ceramtec's Pledged Shares due to the shares being sold at a low price.

I

c. Ceramtec's remaining shares were bought by Tan Sri Tan at a low price causing Ceramtec to lose RM11,646,470.60.

[17] The defendant's summary of case in encl. 39 reads as follows: A

1. The Plaintiff and Defendant entered into an Overdraft Facility ('OD Facility') pursuant to a letter of offer dated 24.12.1999 ('Offer Letter'). It was for the amount of RM9,273,000 for the purpose of financing the purchase of 5,629,000 units of private placement shares of Goh Ban Huat Berhad ('GBH') ('Placement Shares'). B

   1.1. As security for the OD Facility, on 25.2.2000 a Facilities Agreement and a First Party Memorandum of Deposit pledging the Placement Shares ('MOD') were executed. C

   1.2. As further security, a 3rd Party Memorandum of Deposit dated 25.2.2000 ('3rd Party MOD') was executed by Ceramtec Sdn Bhd ('Ceramtec'), pledging 4,030,000 GBH shares ('Initial Pledge'). D

2. During the course of the OD Facility, Ceramtec pledged further GBH shares whenever the drawing margin for the OD Facility was exceeded.

   2.1. On 29.9.2000, Ceramtec pledged 1,380,286 GBH shares ('1st Further Pledge'). E

   2.2. On 22.3.2001, Ceramtec pledged 3,200,000 GBH shares ('2nd Further Pledge').

   2.3. End of 2004, Ceramtec pledged 2,810,000 GBH shares ('3rd Further Pledge'). F

3. The OD Facility was not terminated upon the expiry of 1 year and was extended for another year. However, even after the expiry of the 1 year extension, the OD Facility was not revoked and it continued to exist. Throughout this period, Defendant would service the interest on the OD Facility and also authorised the Plaintiff to sell some of the Placement Shares to regularize the OD Facility. G

4. Towards the end of 2003, there were negotiations between the Plaintiff, the Defendant and Ceramtec concerning the Defendant's OD Facility. The details and terms of the negotiations are set out in paras. 11-14 of the Defence. This event culminated in the issuance of the 2nd letter of offer dated 17.12.2003 by the Plaintiff ('2nd Offer Letter'). I accepted the 2nd Offer Letter subject to payment of a facility fee of RM23,182 which was later reduced to RM15,000. This was paid. H I

5. Under the 2nd Offer Letter, Ceramtec did continue to pledge 8,610,286 GBH shares.

6. Also, during the course of the renewed OD Facility under the 2nd Offer Letter, Ceramtec did pledge another 2,810,000 GBH shares when there was security shortfall ('3rd Further Pledge'). This additional pledge is not in dispute by the Plaintiff.

7. On 18.7.2005, the Plaintiff issued a letter of demand to the Defendant that the Defendant had breached the OD Facility and demanded the repayment of the OD Facility amounting to RM9,341,861.55 ('18.7.2005 LOD'). The Defendant did not pay the sum demanded and neither did the Bank commence legal proceedings to recover the same.

8. About a year later, on 15.5.2006, there was a meeting between the CEO of the Plaintiff, Defendant and Ceramtec. During this meeting it was agreed that:

   8.1. the Defendant would settle the OD Facility on or before 31.12.2006; and

   8.2. the Plaintiff will not force sale the Placement Shares and the GBH shares pledged by Ceramtec under the 3rd Party MOD until after 31.12.2006.

9. Sometime in late September 2006, the Defendant a large block of GBH shares had been forced sold off-market. The Defendant in view of what had taken place contacted the Plaintiff but the Plaintiff was evasive. The Defendant was told by one Bernard Chen to write to the Plaintiff. This the Defendant did on 25.9.2006.

10. On 15.10.2006, the Defendant received a letter signed by Bernard Chen that due to the Defendant's failure to regularise the OD Facility account, the Placement Shares and shares pledge by Ceramtec as third parties were forced sold. In this respect, the Plaintiff referred to its letter dated 18.7.2005.

11. Had the Plaintiff not acted in breach of the Collateral Contract and the agreement that was reached on 15.5.2006, the Defendant would not have suffered the losses in which is now claimed by the Plaintiff.

    [See Annexure A for the breakdown of losses if the Defendant and Ceramtec were to redeem the shares
    (i) in August 2005 when the demand was made or
    (ii) in December 2006 pursuant to the agreement on 15.5.2006.]

Preliminaries

[18] Six witnesses gave evidence for the defendant and Ceramtec, and five witnesses gave evidence for Alliance Bank. The parties have dealt with the evidence and contradictions in the submission in detail. On my part, I find Ceramtec's version relating to a collateral contract, *inter alia*, lacks jurisprudence, and also credibility, as the alleged collateral contract was not documented in any manner, except that it appeared for the first time in the pleadings. In addition, I do not find any basis in the evidence to say the sale was done in bad faith or otherwise to give any credence to the words 'surreptitious sale'. In my view, the words 'surreptitious sale' stands as an exaggeration from the commencement of the trial until the end of the submission.

[19] The main witnesses were, Goh Tai He (PW2) and Ng Soon Lai @ Ng Siek Chuan (PW4), and their evidence relating to the said collateral contract stands as a story and in this respect the submission of the learned counsel for Alliance Bank has much merit, and the relevant parts read as follows:

> 11. The above two (2) witnesses are friends despite PW2's denial. Their testimonies are not to be believed not on this account alone. Both are astute and professional businessmen. Yet, neither one of them, in a private or official memorandum, or letter or e-mail or note, either to the Bank or to the board of directors of Ceramtec, wrote one word that confirms the existence of the collateral agreement alleged.
>
> 12. Is their evidence to be believed? PW4 effectively testified in cross-examination that he had practised a fraud or deceit on Alliance Bank by entering into this alleged collateral agreement with Ceramtec. PW4 testifies that he did not inform anyone in the Bank. Not his colleagues. Not his fellow members of the Exco. Not any member of the Groups Special Assets Department. No one. It therefore comes as no surprise that the Bank does not know anything about this alleged collateral agreement.
>
> 13. Also, PW4 did not brief his successor CEO on this. His evidence is quite clear: He told absolutely no one. He kept it a secret.
>
> 14. PW4's conduct is also inconsistent. If we take everything he said in the witness stand as true, this means he gave certain assurances to Ceramtec. But, he was still employed by the

Bank. He attended the Exco meetings. He kept quiet there. He then attended the Group Special Assets meeting. There, also, he kept quiet. And the evidence is clear: PW4 participated in decisions to sell Ceramtec's pledged shares. He was still with the Bank when the Bank issued the demand on Shalihudin on 18.7.2005. Again, PW4 kept quiet. Then on 15.8.2005, when the Bank made demand on Ceramtec, again, PW4 kept quiet.

15. So, therefore, PW4's conduct is clearly, with respect, dishonest. He testifies that he says one thing to one person (Tony Goh) and later says something completely contradictory to someone else (Alliance Bank).

16. Is it therefore safe to rely on the testimony of someone (i.e. PW4) who has, in effect testified before a court of law as to his own dishonesty, fraud and deceit? There should be no mistake about this: Ng Siek Chuan (PW4) is guilty of fraud and deceptive conduct. If his evidence is to be believed, he is in breach of nearly every duty in law that a CEO owes to the Bank including his fiduciary duty.

17. The question that arises: Is PW4 testifying in order to help his friend, Tony Goh (PW2)? How far can the court accept the evidence of such a person? The answer is quite clear: Not at all. PW4 is a witness of no credit by his very own admission.

18. And what about Tony Goh (PW2)? Can we believe his evidence? He has everything to gain from his evidence. He is an interested witness. More than that, he (and his family) stands to gain a pecuniary benefit from his evidence. Can we believe that Tony Goh (PW2) a Managing Director of a public listed company - GBH - would not write one single note; one memo; one e-mail or one letter referring to this alleged collateral contract? And that he never averred to this, not once in the period from December 2003 until September 2006? And once the Ceramtec shares were sold in September 2006, even then, not once, did he refer to this. What about Ceramtec's board of directors? If they had been briefed about this alleged collateral contract by Tony Goh (PW2) did they demand an explanation from Tony Goh (PW2)? Did Tony Goh (PW2) explain this to the board? Was there a minute of the board to discuss this? There is nothing. Nothing at all. No note, no discussion, no resolution, no briefing. Nothing. The entire allegation of a collateral contract is something created by Tony Goh (and Ceramtec) with the help of a friend: PW4.

[20] The defendant has relied much on the evidence led by Ceramtec to pursue his claim and counterclaim. In essence the defendant is a borrower subject to facility terms. If there is a breach of any contractual terms his remedy lies within the Contracts Act 1950. Raising a counterclaim in the form of declaration does not subscribe to s. 41 of the Specific Relief Act 1950. In my view it is an abuse of process of court. In consequence the declaratory prayers which are discretionary reliefs ought to have been dismissed *in limine*. In *Waja Manufacturing (M) Sdn Bhd & 4 Ors v. Alliance Bank Malaysia Berhad* (yet to be reported), I made the following observations:

> In addition to the above, I must say that declaratory orders stand as a discretionary relief. The nature of the prayers which the plaintiff is attempting to seek does not correspond with the complaint. Even if the complaint was established the evidence led will in the instant case will not move the court to grant such wide declaratory orders. In my view the plaintiff's complaint is related to a contractual breach at the most and the law is governed by the Contracts Act 1950 and the relief is provided within the four corners of the contract. A claim anchored on declaratory prayers ought to be dismissed *in limine*.

[21] Whether granting of declaratory reliefs are cultured for such purpose, must be explored in the right perspective. More so when the purpose of the declaratory relief is generally restricted to what is stated in s. 41 of the Specific Relief Act 1950 which reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief.
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[22] In dealing with a similar section in India, *Deokali Koer v. Kedar Nath* [1912] 39 Cal 704 the court had this to say:

> The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled' to any legal character or to any right as to nay property: It is the disregard of this that

A accounts for the multiform and at times, eccentric declarations which find a place in Indian plaints. If the Courts were astute - as I think they should be - to see that the plaint presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases would no longer arise. In the same case the learned Judge said: "It is a common fashion to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour."

[23] The learned authors of "*Pollock & Mulla, Indian Contract and Specific Relief Acts*, 10th edn., JL Kapur, NM Tripathi Private Ltd 1986" at p. 1063 cited Indian cases, and one of which relates to these observations:

> It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

[24] I have heard the evidence, read the documents, and the lengthy submission of the parties in detail. I am grateful to the learned counsels for placing a comprehensive submission on the evidence, contradictions, facts and law. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for Ceramtec and the defendant, I take the view that the claim by Alliance Bank against the defendant must be allowed, and the claim and counterclaim by Ceramtec and the defendant respectively against Alliance Bank, must be dismissed. My reasons, *inter alia*, are as follows:

(a) I have meticulously scrutinised the evidence repeatedly, and I find no evidence of collateral contract which can be sustained according to law. In this respect I agree with the submission of the learned counsel for Alliance Bank that there was no collateral contract as alleged by the parties.

(b) Ceramtec complains that the sale of shares was wrongful in essence for the following reasons:

> (i) Breach of collateral agreement whereby the Bank had agreed to give notice to Ceramtec, and to afford Ceramtec an opportunity to redeem the pledged shares;

(ii) Breach of the representation and/or assurance given on 15.5.2006 meeting that no steps will be taken to sell the shares until the end of December 2006;

(iii) Breach of the right of redemption of Ceramtec;

(iv) No reasonable notice was given;

(v) The notice dated 15.8.2005 had lapsed, and there was a delay of 13 months in respect of the sale;

(vi) The notice was no longer effective as being superseded by intervening events by relying on a number of cases, and also the Contracts Act 1950, to assert that a giver of security has at law, a right to reasonable notice to redeem the security.

(c) The cases relied by Ceramtec can be summarised as follows:

(i) In *Miller v. Cook (supra)*, the debenture provided that the lender had a power to sell the security upon default by the borrower, however, the debenture did not provide for any prior notice to be given to the borrower. It was held that it is oppressive for the lender not to give any notice of intended sale of the securities because this would extinguish the right of redemption of the borrower. Sir John Stuart VC stated:

> In the present case, besides the other objections to the contract, the terms of the power of sale are oppressive, and put the Plaintiff completely at the mercy of the Defendant. The power to sell without any notice to the Plaintiff enabled the Defendant at any moment to extinguish the right of redemption.

(ii) In *Deverges v. Sandeman (supra)*, the borrower granted the lender a mortgage over the borrower's shares in a company as security for the loan. The loan document was silent as to the right of the lender to sell the security and thus also silent as to the giving of any notice. It was held:

> According to those authorities it would seem to me that when no time for payment has been originally fixed, then, before the power of sale can be exercised, notice is to be given to the mortgagor, and default must be made by him in payment after such notice. What this notice is to contain is nowhere defined; but it must, of course, be a notice which is in all respects reasonable, regard being had to the circumstances of the case ... The notice must give a reasonable opportunity to the mortgagor to

> pay what is due under the mortgage; and I think it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that, if he fails to avail himself of the opportunity given to redeem, the mortgagee will be in a position to put in force his rights.

(iii) In *Seow Mui Kim v. Perwira Habib Bank (supra)* the pledgor was a 3rd party pledgor of shares in a company to the bank as security for loans to the borrowers. The bank had sought to transfer and register the said securities in the name of its nominee. The 3rd pledgor objected. The court held that the bank was entitled to do so to perfect its security, however, the court went on to state that nevertheless if the shares are to be sold, reasonable notice would have to be given to the 3rd party pledgor. In this regard, the Court also stated that it made no difference whether the shares held as security was by way of a mortgage or a pledge. It was stated by Justice Gunn Chit Tuan:

> As in India there can be a pledge of shares and there can also be a mortgage of shares; whether it is one or the other will depend on the intention of the parties and the circumstances of each case. (See Das J *in Arjun Prasad v. Central Bank of India*). For the purpose of a sale of shares the distinction between a mortgage and a pledge would not be material as in either case reasonable notice would have to be given.

(iv) Further, Section 129 of the Contracts Act 1950 provides that reasonable notice must be given prior to any sale of a thing pledged. It provides that:

> If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise in respect of which goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

(v) Justice Gunn Chit Tuan stated that Section 129 of the Contracts Act 1950 applied to the pledge of shares as security in *Seow Mui Kim v. Perwira Habib Bank (supra)* as follows:

> Mr Sri Ram considered that the transaction in this case was a pledge in which case the pawnee must give the pawnor reasonable notice of sale under

> section 129 of the Contracts Act, 1950 (Revised - 1974) before he might sell the thing pledged. Both counsel for the applicants/defendants, however submitted that the transaction was a mortgage which by law, in the absence of an express power of sale, gives an implied right to the mortgagee to sell after giving reasonable notice. As our Contracts Act, 1950, is similar to the Indian Contracts Act the position here would therefore be similar to that in India where shares are goods and therefore pledgeable. As in India there can be a pledge of shares and there can also be a mortgage of shares; whether it is one or the other will depend on the intention of the parties and the circumstances of each case. (See Das J. in *Arjun Prasad v. Central Bank of India*). For the purpose of a sale of shares the distinction between a mortgage and a pledge would not be material as in either case reasonable notice would have to be given.

(d) In addition, the learned counsel for Ceramtec asserts that: (i) the letter dated 15 August 2005 gave Ceramtec seven days to make payment. (ii) since no action was taken after the seven days it ought to have issued further notice of demand before the sale, and relies on a number of cases to drive home this point. They can be summarised as follows:

(i) In *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd (supra)* the Court of Appeal cited the following passage in *Luck v. White* with approval:

> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances.

(ii) In *Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading (supra)* it was held:

> The original stipulation in regard to time having been waived by the plaintiffs, in my view, before taking the present action for breach of contract, the plaintiffs should have given reasonable notice to the defendants requesting delivery within a stated period.

(iii) In *Charles Rickards v. Oppenhaim (supra)* it was held:

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter, it is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. The promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

(iv) In *Lingard's Bank Security Documents*, 4th Edition, pages 239 to 241 at 241 wherein is stated:

> If a demand becomes stale, it may be contended that it has been waived and a fresh demand should be served.

(v) In *Wong Kup Sing v. Jeram Rubber Estates Ltd. (supra)* it was held:

> Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid.

I do not find merit in Ceramtec's complaint, taking into consideration the factual matrix of the case, and specific terms that parties have agreed, which are not the basis for the decision in the cases which Ceramtec has relied on. The general principles of law cannot be applied in abstract when the contractual terms make those general principles of law inapplicable. In the instant case, there is much merit in the submission of the learned counsel for Alliance Bank which states as follows:

> Ceramtec agreed to the terms of the 3rd Party Memorandum of Deposit. Clauses 3 and 15 show Ceramtec's express, written agreement that:
>
> (i) Ceramtec has no right of redemption;

(ii) Ceramtec has no equity over the pledged shares;

(iii) Ceramtec does not have to be notified of the sale;

(iv) the Bank does not need Ceramtec's consent to sell the shares; and

(v) Clause 15 states, twice, that these rights conferred on Alliance Bank by Ceramtec are irrevocable.

(e) The learned counsel for Ceramtec has also invited the court to invoke s. 114(g) of the Evidence Act 1950 for Alliance Bank's failure to call some of the witnesses who were relevant to deny Ceramtec's and the defendant's allegation. It is settled law that he who alleges must prove and this is also a strict requirement of the Evidence Act 1950. In the instant case, it must not be forgotten that Ceramtec and the defendant for the counterclaim stand as plaintiffs for their respective case. I am not aware of any civil case where the court has compromised the burden of proof placed on the plaintiff by invoking s. 114(g) of the Evidence Act 1950 in the manner learned counsel for Ceramtec is inviting the court to do so.

(f) I agree with the learned counsel for Alliance Bank that the defendant has no defence. The counterclaim, for reasons stated earlier, has no substance, and is an abuse of process of court.

(g) The complaint of surreptitious sale has no merit as the contractual terms provide for such sale. In addition, taking into consideration the volatile nature of share prices, it cannot be said to be unreasonable for the bank to sell shares in a surreptitious manner if the terms of the contract provide for, as in the instant case. It is my finding that Alliance Bank has not breached any of its obligations in the sale of share as provided in the facility terms and/or conducted itself unfairly in breach of the contractual terms. I do not find any surreptitious conduct as complained of by Ceramtec and the defendant.

[25] For reasons stated above, and after having heard submission on the issue of costs, I make the following orders:

(a) Alliance Bank's claim against the defendant in Suit No: D2-22-240-2007 is allowed, as prayed and the defendant's counterclaim is dismissed. The defendant to pay costs in the sum of RM150,000 to Alliance Bank.

(b) Ceramtec's claim against Alliance Bank is dismissed with costs. Ceramtec to pay agreed costs in the sum of RM150,000 to Alliance Bank.

(c) Before extraction of the order for costs Alliance Bank to pay the allocatur fee, and the Deputy Registrar to issue the certificate for the allocatur.

[26] I hereby order so.